

H6CHLEVP

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 UNITED STATES OF AMERICA,

5 v.

16 Cr. 715 (JSR)

6 HAROLD LEVINE,

7 Defendant.

8 -----x
9 Plea

10 11 New York, N.Y.
12 13 June 12, 2017
14 15 2:40 p.m.

16 Before:

17 18 HON. JED S. RAKOFF,

19 20 District Judge

21 22 APPEARANCES

23 24 JOON H. KIM
25 26 Acting United States Attorney for the
27 28 Southern District of New York
28 STANLEY J. OKULA
29 DANIEL NOBLE
30 Assistant United States Attorneys

31 32 GERALD B. LEFCOURT
33 34 SHERYL E. REICH
35 36 Attorney for Defendant

37 38 ALSO PRESENT: GIOVANNI LEPORE, Special agent, IRS

H6CHLEVP

1 (Case called)

2 THE COURT: Good afternoon. So I had thought that the
3 high point of my summer was going to be a trial, especially
4 with Mr. Lefcourt, and I'd even taken the added pleasure of
5 knowing that it was disrupting his summer vacation plans. But
6 I understand, Mr. Lefcourt, that your client wishes to plead
7 guilty.

8 MR. LEFCOURT: That is true, your Honor.

9 THE COURT: All right. We'll place him under oath.

10 MR. LEFCOURT: We'll have another one at some point.

11 THE COURT: We'll place the defendant under oath.

12 (Defendant sworn)

13 THE COURT: Mr. Levine, let me first advise you that
14 because you're under oath, anything you say that is knowingly
15 false will subject you to punishment for perjury or obstruction
16 of justice, or making a false statement. Do you understand?

17 THE DEFENDANT: Yes.

18 THE COURT: You don't have to stand. Just get closer
19 to the microphone.

20 Do you read, write, speak, and understand English?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: How far did you go in school?

23 THE DEFENDANT: I got a law degree and then an LLM.

24 THE COURT: And how old are you now?

25 THE DEFENDANT: Fifty-nine.

H6CHLEVP

1 THE COURT: Are you single or married?

2 THE DEFENDANT: Single.

3 THE COURT: You have any children?

4 THE DEFENDANT: Two.

5 THE COURT: How old are they?

6 THE DEFENDANT: 16 and 13.

7 THE COURT: And are they living with you?

8 THE DEFENDANT: Half the time.

9 THE COURT: Have you ever been treated by a
10 psychiatrist or psychologist?

11 THE DEFENDANT: I don't -- I've gone to them one or
12 two times.

13 THE COURT: Anytime recently?

14 THE DEFENDANT: No.

15 THE COURT: Have you ever been hospitalized for any
16 mental illness?

17 THE DEFENDANT: No, sir.

18 THE COURT: Have you ever been treated or hospitalized
19 for alcoholism?

20 THE DEFENDANT: No, sir.

21 THE COURT: Have you ever been treated or hospitalized
22 for drug addiction?

23 THE DEFENDANT: No, sir.

24 THE COURT: Are you currently under the care of a
25 physician for any reason?

H6CHLEVP

1 THE DEFENDANT: Yes, sir.

2 THE COURT: What is that?

3 THE DEFENDANT: It's a long list. Mostly for my
4 heart. I had a quadruple bypass 15 years ago. I had a stroke
5 five years, six years ago.

6 THE COURT: Have you taken any medication in
7 connection with that?

8 THE DEFENDANT: Yes, for all of that and for diabetes.

9 THE COURT: Tell me the medications you're taking.

10 THE DEFENDANT: I take a daily injection of Victoza
11 for my diabetes. I take Toprol and atorvastatin for my heart,
12 and I take Avelox for my stroke, and I take some
13 over-the-counter for my -- I had bariatric surgery about three
14 and a half years ago because of the complications from all the
15 other stuff.

16 THE COURT: Do any of those medicines, either
17 individually or in combination, affect your ability to
18 understand these proceedings?

19 THE DEFENDANT: No, sir.

20 THE COURT: Do they affect your mental state in any
21 way relevant to these proceedings?

22 THE DEFENDANT: No, sir.

23 THE COURT: Is your mind clear today?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Do you understand these proceedings?

H6CHLEVP

1 THE DEFENDANT: Yes, sir.

2 THE COURT: On the basis of the defendant's response
3 to my questions and my observations of his demeanor, I find he
4 is fully competent to enter an informed plea at this time.

5 Now, you have a right to be represented by counsel at
6 every stage of these proceedings. Do you understand that?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: If at any time you can't afford counsel,
9 the Court will appoint one to represent you free of charge
10 throughout the proceedings. Do you understand that?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: You are represented by Mr. Lefcourt. Are
13 you satisfied with his representation?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Have you had a full opportunity to discuss
16 this matter with him?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Have you told him everything you know
19 about this matter?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Very good. Now, you previously entered a
22 plea of not guilty to indictment 16 Cr. 715, but I understand
23 that you wish to plead guilty to Counts One and Three in
24 satisfaction of the indictment; is that correct?

25 THE DEFENDANT: Yes, sir.

H6CHLEVP

1 THE COURT: Before I can accept any plea of guilty, I
2 need to make certain you understand the rights that you will be
3 giving up if you plead guilty. So I want to go over with you
4 now the rights that you will be giving up. Do you understand
5 that?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: First, you have a right to a speedy and a
8 public trial by a jury on the charges against you. Do you
9 understand that?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Second, if there were a trial, you would
12 be presumed innocent, and the government would be required to
13 prove your guilt beyond a reasonable doubt before you could be
14 convicted of any charge. Do you understand that?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Third, at the trial you would have the
17 right to be represented by counsel, and once again, if at any
18 time you cannot afford counsel, the Court would appoint one to
19 represent you free of charge throughout the trial and at all
20 other proceedings. Do you understand that?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Fourth, at the trial you would have the
23 right to see and hear all the witnesses and other evidence
24 against you, and your attorney could cross-examine the
25 government's witnesses and object to the government's evidence

H6CHLEVP

1 and could offer evidence in your own behalf if you so desired
2 and could have subpoenas issued to compel the attendance of
3 witnesses and the production of other evidence on your behalf.
4 Do you understand all that?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Fifth, at the trial you would have the
7 right to testify if you wanted to, but no one could force you
8 to testify if you did not want to, and no suggestion of guilt
9 could be drawn against you simply because you chose not to
10 testify. Do you understand that?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Finally, even if you were convicted of one
13 or more counts, you would have the right to appeal that
14 conviction. Do you understand that?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Now, do you understand that if you plead
17 guilty, you will be giving up each and every one of the rights
18 we just discussed? Do you understand that?

19 THE DEFENDANT: I do.

20 THE COURT: Very good. Now, you've gone over with
21 your counsel Counts One and Three of the indictment, yes?

22 THE DEFENDANT: Yes.

23 THE COURT: And you've read the counts to yourself and
24 discussed them with your lawyer, yes?

25 THE DEFENDANT: Yes.

H6CHLEVP

1 THE COURT: Mr. Lefcourt, do you want those two counts
2 read here again in public court, or do you waive the public
3 reading?

4 MR. LEFCOURT: I would waive the public reading, your
5 Honor.

6 THE COURT: The first count, Count One, charges you
7 with corruptly endeavoring to obstruct and impede the due
8 administration of the Internal Revenue laws. And does the
9 government want to go over the elements of that for the record?

10 MR. OKULA: I'd be happy to, your Honor. I passed up
11 to your Honor's deputy what I'm calling our Court Exhibit 1 for
12 today's purposes which outline the elements of the offenses for
13 both Count One and Count Three. Starting with Count One, the
14 7212(a) charge, that requires the government to prove beyond a
15 reasonable doubt two elements: First, that the defendant acted
16 corruptly. And in this context, to act corruptly means to act
17 with the intent to secure an unlawful advantage or benefit
18 either for oneself or for another. And the term "endeavor"
19 means knowingly and deliberately to act or make an effort that
20 has a reasonable tendency to bring about the desired results.
21 So that's the first element.

22 The second and final element is that the defendant
23 acted with the intent to impede or obstruct the enforcement of
24 the federal tax laws. This means simply any effort to obstruct
25 the proper administration of the tax code, including the IRS's

H6CHLEVP

1 efforts to collect, assess, and determine the tax liabilities
2 of individuals.

3 THE COURT: By the way, did you furnish a copy of this
4 to defense counsel?

5 MR. OKULA: We did indeed, your Honor.

6 THE COURT: All right. I will mark it as Court
7 Exhibit 1, though noting my objection to the fact that at the
8 very bottom of the first page, you cite Sand, *Modern Federal*
9 *Jury Instructions* rather than Sand, et al., *Modern Federal Jury*
10 *Instructions*, and I am one of the "al's."

11 MR. OKULA: Duly noted.

12 THE COURT: But I will accept this nonetheless.

13 MR. OKULA: Your Honor, may I put one additional
14 matter on the record? Your Honor in the Court's opinion
15 denying the motion to dismiss cited a case called *United States*
16 *v. Marinello*, which is the Second Circuit's most recent
17 treatment of 7212(a). There was a cert petition pending in the
18 Supreme Court in the *Marinello* case, and the essence of the
19 cert petition is an effort to essentially engraft onto 7212(a)
20 an element that the Sixth Circuit has found should be present
21 in any 7212(a) charge, that is, the pendency of an IRS
22 investigation or enforcement action of which the defendant was
23 aware at the time of the offense. *Marinello* rejected that.

24 But I want to put on the record the fact that if -- at
25 trial we would be able to prove beyond a reasonable doubt in

H6CHLEVP

1 this particular case, your Honor, that the defendant, one, was
2 aware of IRS enforcement action with respect to his tax
3 affairs, and I think your Honor will see from his allocution,
4 the defendant's allocution, that part of his efforts, corrupt
5 efforts, were to obstruct that administrative action. I just
6 want to put that on the record in the event the Supreme Court
7 does something with respect to 7212(a).

8 THE COURT: All right. Thank you for doing that. You
9 never know what the Supreme Court's going to do, as history has
10 shown.

11 Now, back to you, Mr. Levine. Is it Levine or Levine?

12 THE DEFENDANT: Levine.

13 THE COURT: Levine.

14 The maximum penalty you face under Count One if you
15 plead guilty to that count is three years' imprisonment plus up
16 to one year of supervised release to follow imprisonment, plus
17 a maximum fine of whichever is greatest, either \$250,000 or
18 twice the amount of money derived from the offense or twice the
19 loss to victims of the offense, plus a \$100 mandatory special
20 assessment. Do you understand that those are the maximum
21 punishments under Count One?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Let's turn to Count Three, which is the
24 tax evasion count. Mr. Okula, do you want to go over the
25 elements of that as well?

H6CHLEVP

1 MR. OKULA: I'd be happy to, your Honor. There are
2 three elements of tax evasion, 26 U.S.C. Section 7201. They
3 are, first, the existence of a tax deficiency; second, that the
4 defendant committed an affirmative act of evasion; and, third,
5 that the defendant acted willfully, which in the criminal tax
6 context means that he acted with the intent to violate a known
7 legal duty.

8 THE COURT: The one question I had about your
9 citations there, which is just a question, I didn't have time
10 to look it up, you give as one of the cases *United States v.*
11 *Plitman*, P-l-i-t-m-a-n. Is that right?

12 MR. OKULA: That is correct, Jacob Plitman, your
13 Honor.

14 THE COURT: All right. That's an unusual last name.
15 Not as unusual as Okula, but still unusual.

16 All right. Mr. Levine, Count Three carries a maximum
17 term of imprisonment of five years, plus supervised release of
18 up to three years to follow any imprisonment, plus a maximum
19 fine of whichever is greatest, either \$250,000 or twice the
20 gross gain or twice the gross loss, plus a \$100 mandatory
21 special assessment. Do you understand those are the maximum
22 punishments under Count Three?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: And if you plead guilty to both counts,
25 then the sentence could be cumulative, so you would face up to

H6CHLEVP

1 eight years in prison maximum. Do you understand?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Also, if I were to impose any term of
4 supervised release and you were to violate any conditions of
5 supervised release, that violation in and of itself could
6 subject you to still further imprisonment going even beyond the
7 term of supervised release. Do you understand that?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Very good. Now, in fact, at this point I
10 have absolutely no idea what sentence I will impose if you
11 plead guilty, but I will look at all the factors under Section
12 3553(a) of Title 18. And one of those factors is the
13 sentencing guidelines which are certain laws that are not
14 binding on the Court but which recommend a sentencing range in
15 which the Court is recommended to sentence you.

16 Have you gone over the sentencing guidelines with your
17 lawyer?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: In that connection, I've been furnished
20 with a letter agreement, which we will mark the original as
21 Court Exhibit 2 to today's proceeding, and it takes the form of
22 a letter from the prosecution to the defense. And it appears,
23 Mr. Levine, that you signed it earlier today; is that correct?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Before signing it, did you read it?

H6CHLEVP

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Did you discuss it with your counsel?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Did you understand its terms?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Did you sign it in order to indicate your
7 agreement to its terms?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Now, this letter agreement that we've now
10 marked as Court Exhibit 2 is binding between you and the
11 government, but it is not binding on me. It's not binding on
12 the Court. Do you understand that?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: For example, I notice there was a slight
15 change from an earlier draft, and in that change there's a
16 paragraph that reads: "Nor will either party in any way
17 suggest that the probation office or the Court consider such
18 departure or adjustments under the guidelines," using
19 departures or adjustments for the stipulated sentencing range.
20 Well, I don't much care whether you guys suggest it or not
21 because I'm going to make my own determination, and your
22 stipulations are not binding on me in any way, shape, or form.

23 Yes.

24 MR. LEFCOURT: Your Honor, I just wanted to make one
25 addition, because in discussing this with the defendant, I

H6CHLEVP

1 think that the agreement is clear as between the defense and
2 the government that, notwithstanding out stipulation to the
3 guideline level with the government, we are free under this
4 agreement to argue 3553(a) factors and seek a sentence below --

5 THE COURT: Yes, that's clear from the language of the
6 agreement. And even if the contrary were in the agreement, I
7 would release you from that because I don't believe in that.
8 This Court is going to find out what the right sentence is, and
9 it's going to elicit from the lawyers from both sides all the
10 information that I need to determine the right sentence. And
11 all this boilerplate is neither here nor there, but it is
12 binding between the two of you.

13 The reason I mention that, Mr. Levine, is that under
14 this agreement, the government believes the guidelines range is
15 37 to 46 months; the defense believes it's 24 to 30 months.
16 But you have agreed with the government that if it's anything
17 less than 46 months, you will not appeal or otherwise
18 collaterally attack your sentence. Do you understand that?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: All right. Very good. Now let me ask the
21 government, other than this agreement, have any promises been
22 made to the defendant in connection with this plea?

23 MR. OKULA: There are no other promises, your Honor.

24 THE COURT: Mr. Lefcourt, you agree with that?

25 MR. LEFCOURT: Yes, your Honor.

H6CHLEVP

1 THE COURT: Mr. Levine, you agree with that?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Mr. Levine, other than the government, has
4 anyone else made any kind of promise to you or offered you any
5 inducement to get you to plead guilty in this case?

6 THE DEFENDANT: No, sir.

7 THE COURT: Has anyone threatened you or forced you to
8 plead guilty in this case?

9 THE DEFENDANT: No, sir.

10 THE COURT: Does the government affirm that if this
11 case were to go to trial, it could through competent evidence
12 prove every essential element of each of these two counts
13 beyond a reasonable doubt?

14 MR. OKULA: We could indeed, your Honor.

15 THE COURT: Now, sometimes the government wants to
16 give a little summary of its evidence. I don't require that,
17 but if you want to, you're free to.

18 MR. OKULA: I don't think it's necessary, your Honor.
19 If the Court wants it, I'm happy to do it, but otherwise --

20 THE COURT: No, I don't require it. What I do require
21 and I'm anxious to hear is from Mr. Levine. Please tell me in
22 your own words what it is you did that makes you guilty of
23 these counts.

24 THE DEFENDANT: In 2005 through 2008, 2010, and 2011,
25 I filed false tax returns that did not include substantial

H6CHLEVP

1 income. I signed these returns and submitted them to the IRS.
2 I knew it was my legal obligation to report all of my income to
3 the IRS, and I did not do that. As a result, I failed to pay
4 substantial taxes that were due and owing. I am pleading
5 guilty because I am responsible.

6 THE COURT: Just on that, you knew that you were
7 thereby evading payment of taxes that were otherwise due, yes?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Very good. Go ahead.

10 THE DEFENDANT: I also submitted a false response to
11 an information document request issued by the IRS, and I made
12 statements to the IRS that were not true. In advance of
13 someone else testifying before the IRS, I told that person what
14 I had said, and I did so with the expectation that they would
15 make the same untrue statements.

16 THE COURT: Just picking up on the prosecutor's point,
17 so you knew that this was part of an ongoing IRS investigation?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Go ahead.

20 THE DEFENDANT: This process has been devastating to
21 me and has the potential to destroy the relationships that I
22 care most deeply about, those with my two children. I am
23 hopeful that by taking this step, admitting what I did, and
24 facing the consequences of it, I can begin to make it up to
25 them. I am deeply sorry for what I did and the choices I made,

H6CHLEVP

1 but I am profoundly sorry for the ways in which I have hurt my
2 children.

3 THE COURT: All right. Is there anything else
4 regarding the factual portion of the allocution that the
5 government wishes the Court to inquire about?

6 MR. OKULA: No, your Honor. I believe it covered all
7 the elements.

8 THE COURT: Is there anything about any aspect of the
9 allocution that either counsel wishes the Court to further
10 inquire about?

11 MR. OKULA: No, your Honor.

12 MR. LEFCOURT: No, your Honor.

13 THE COURT: Mr. Levine, in light of everything that
14 we've now discussed, how then do you now plead, first, to Count
15 One, the obstruction count, guilty or not guilty?

16 THE DEFENDANT: Guilty, sir.

17 THE COURT: How do you plead to Count Three, the
18 evasion count, guilty or not guilty?

19 THE DEFENDANT: Guilty, sir.

20 THE COURT: Because the defendant has acknowledged his
21 guilt as charged, because he has shown that he understands his
22 rights, and because his plea is entered knowingly and
23 voluntarily and was supported by an independent basis in fact
24 containing each of the essential elements of each of the two
25 offenses, I accept his plea and adjudge him guilty of Counts

H6CHLEVP

1 One and Three of indictment 16 Cr. 715.

2 Now, Mr. Levine, the next stage in this process is
3 that the probation office will prepare a presentence report to
4 assist me in determining sentence. As part of that process,
5 you will be interviewed by the probation officer. You can have
6 your counsel present to advise you of your rights, but under my
7 practices, if you want to qualify for the full acceptance of
8 responsibility, you personally need to answer any and all
9 questions put to you by the probation officer. Do you
10 understand?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: After that report is in draft form but
13 before it's in final form, you and your counsel and also the
14 government counsel will have a chance to review it and offer
15 suggestions, corrections, and additions to the probation
16 officer who will then prepare the report in final to come to
17 me. Independent of that, counsel for both sides are hereby
18 given leave to submit directly to the Court in writing any and
19 all materials bearing on any sentence, provided those materials
20 are submitted no later than one week before sentence.

21 I want to just add to that. I'm sure your counsel
22 knows this, Mr. Levine, but for your benefit, first, like every
23 judge, sentencing is both the hardest and the most important
24 thing that any judge does. In that regard, to be frank, I pay
25 no more attention to the guidelines than the law requires me

H6CHLEVP

1 to. I am much more interested in the factors under Section
2 3553(a), both good and bad. So I need to know as much about
3 you, I need to know as much about the crimes as you folks can
4 tell me. The one misfortune of a case not going to trial is I
5 don't have the same feel for either the crimes or the
6 perpetrator as I would if the case had gone. So I solicit both
7 sides to present me with voluminous materials. I will not be
8 offended by receiving a lot of information.

9 We will set the sentence down for.

10 THE DEPUTY CLERK: October 11 at 3:00.

11 THE COURT: October 11 at 3:00 p.m.

12 All right. Anything else we need to take up today?

13 THE DEPUTY CLERK: I'm sorry. I meant 11th,
14 October 11.

15 THE COURT: Yes, that's what you said. You said it
16 and you meant it.

17 Anything else you need to take up today?

18 MR. OKULA: Nothing on behalf of the government.

19 Thank you.

20 MR. LEFCOURT: No, your Honor.

21 THE COURT: Very good. Thanks.

22 (Adjourned)